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No. 77-104

In the Supreme Court of the United States

OCTOBER TERM, 1977

CONSOLIDATED RAIL CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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The facts of this case were succinctly stated by the court of appeals (Pet. App. B, pp. A33-A34; footnote omitted):

> In a special rulemaking proceeding, the Interstate Commerce Commission has determined that there exists a national shortage of epoxy-lined ("XF") boxcars and has required railroads using another line's XF cars to make incentive per diem ("IPD") payments to their owners. * * *
>
> According to the Commission, the transportation of processed foods in ordinary boxcars presents serious risks of contamination. Ordinary boxcars ("XM") are often infested with insects and rodents from the cargoes they carry. Processed food at the

present time is carried predominantly in "class A" XM boxcars, which are ordinary cars that have been cleaned and inspected. The Commission has determined that these sanitizing procedures are insufficient. The visual inspection carried out for class A designation cannot detect any infestations between car walls, and the quality of such inspections varies. Further, it is possible for non-visible contaminants to later be introduced into the car. Thus, the Commission found that only the XF boxcars are sufficiently sanitary for the transportation of processed food, since the white epoxy lining prevents contaminants between the car walls from reaching the food.

The Commission's finding of a shortage was based on evidence that 750,000 carloads of processed food are shipped annually, requiring a nation-wide fleet of 40,000-50,000 suitable cars. Since it has determined that only about 3,000 such cars exist, the Commission found a clear national shortage. IPD was thus imposed with the expectation that this would encourage the acquisition of XF boxcars.

The court of appeals, with one judge dissenting, sustained the Commission's imposition of an incentive per diem on the use of XF cars (Pet. App. B, pp. A32-A71). Petitioners challenge this decision on two grounds, neither of which has merit or warrants this Court's review.

1. Petitioners contend (Pet. 9-11) that the Commission's finding of a shortage of XF cars is not supported by substantial evidence. They appear to rest this contention upon the argument that other cars also are suitable for transporting processed foods, so that it was not enough for the Commission to find that the current stock of XF cars is seriously inadequate for

transportation of such foods. The Commission, of course, was aware that other cars may be used, and are used, for transporting food products. But the Commission determined, for reasons elaborated in its opinion (Pet. App. B, pp. A14-A15), that use of cars other than XF cars for that purpose poses significant health hazards and creates a substantial risk of contamination.[1] Since it was undisputed that the current stock of XF cars is far too small for the carriage of the nation's supply of foodstuff (see Pet. App. B, p. A34), the Commission properly concluded that "[t]he increased incidence of contamination and the concomitant expanded application of pesticides which are inevitable with the increased use of XM cars in the transportations of food do * * * establish the existence of a shortage of XF cars" (Pet. App. B, p. A16).

In these circumstances, contrary to petitioners' apparent claim (Pet. 10, 13), it was not necessary for the Commission to find that terminating car users or others had failed to release cars expeditiously.[2] Petitioners apparently rely upon the dissenting judge's conclusion

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[1]This determination was based in part upon an Environmental Threshold Assessment Survey prepared by the Commission's staff; petitioners were invited to comment on the Survey but they chose not to do so (Pet. App. B, p. A15 and n. 5). Indeed, petitioners here do not appear to contest the finding that use of XF cars poses fewer health hazards.

[2]Petitioners also suggest (Pet. 10) that the imposition of an incentive per diem would not serve the statutory purpose of providing owners with increased returns. That suggestion has no basis. The imposition of an incentive plainly will provide owners with an increased return, and the Commission expressly noted that "these higher rates of return will make the purchase of XF cars sufficiently attractive to channel more railroad investment into the national boxcar fleet" (Pet. App. B, p. A19).

that the legislative history suggests that an incentive per diem may be imposed only when boxcar shortages result from the holding of owners' cars by other carriers. But that conclusion is wide of the mark. The legislative history reveals that the principal intention was to provide an incentive for the acquisition of new cars, and that encouraging expeditious return of existing stock was a subordinate consideration. See S. Rep. No. 386, 89th Cong., 1st Sess. 1, 4 (1965). Indeed, the House Report expressed skepticism over claims that "overdetention" was shown to be a cause of the chronic freight car shortage. H.R. Rep. No. 1183, 89th Cong., 1st Sess. 2-3 (1965).

Moreover, the statute itself does not require a finding of overdetention; it only requires that the incentive per diem "contribute to sound car service practices * * * and encourage the acquisition and maintenance of [an adequate] car supply." Section 1(14)(a) of the Interstate Commerce Act, as added, 40 Stat. 101, and amended, 49 U.S.C. 1(14)(a). "Sound car service practices" includes matters other than over-detention. The Commission's decision properly was directed to a broader view of "car service practices" (Pet. App. B, p. A18):

> Increased supply and improved utilization of XF cars will have an immediate beneficial effect on the national freight car supply generally. By minimizing, if not eliminating, the need for XM boxcars in food-quality service, we will free these general service cars for use wherever they are required. Concurrently, general service cars will be held for shorter periods, as the need for the time-consuming process of decontamination will be substantially reduced.

2. Petitioners incorrectly contend (Pet. 11-14) that the court of appeals improperly supplied a basis for the

Commission's decision not stated by the Commission in its opinion.

Petitioners challenge (Pet. 11) the court's statement that "IPD was * * * imposed with the expectation that this would encourage the acquisition of XF boxcars" (Pet. App. B, p. A34). But the Commission several times explicitly stated that purpose and expectation (see, *e.g.*, Pet. App. B, pp. A17, A19). The court supplied no new basis for the administrative decision.

Petitioners also claim that "it was the court and not the Commission which undertook to explain the agency's departure from prior norms" (Pet. 12). The "prior norms" to which petitioners refer apparently is the listing, in *Incentive Per Diem Charges-1968*, 349 I.C.C. 303, of certain evidentiary showings that should be made as a condition for extension of the incentive per diem program.[3] But the Commission itself explained that it was forced to act with a less full record here "because our experience with XF cars is limited by the recent 1973 origin of the XF designation" (Pet. App. B, A13). The court of appeals, including the dissenting judge, accepted that explanation without significantly enlarging upon it (Pet. App. B, pp. A35, A49-A50 n. 26).[4] The court did not supply a new rationale of its own.

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[3]The Commission in the past has been willing to consider taking other action on a lesser evidentiary showing than is normally required, when circumstances otherwise indicate the appropriateness of such action. See *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538; *Twin City Freight, Inc.* v. *United States*, 360 F. Supp. 709, 712 (D. Minn.). There is therefore no rigid precedent from which the Commission departed in this case.

[4]As the dissenting judge noted, "the Commission was acting within its permitted discretion when it chose to examine the shortage question on the basis of whatever record could be generated given the relative newness of the XF classification" (Pet. App. B, p. A50 n. 26).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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